

Endangered Species Act (ESA) Section 7 Consultations on U.S. Army Corps of Engineers
(USACE) Enforcement Actions

This document clarifies NMFS's role in the USACE after-the-fact permitting process. Using the phrase "after-the-fact" can be problematic when communicating between NMFS and USACE. While USACE can issue after-the-fact permits, NMFS has a strict policy of not conducting after-the-fact consultations. However, NMFS can conduct ESA Section 7 consultation on USACE's enforcement actions, which may include after-the-fact permitting to implement corrective measures for permit violations. For clarity, the two agencies should refer to ESA Section 7 consultation on USACE enforcement actions, which can include corrective permitting.

NMFS does not conduct ESA section 7 consultation on actions that are already completed. Consultation is intended as a prospective process to evaluate the impacts of federal actions that will occur in the future or ongoing federal actions that can still be modified or conditioned in authorizing documents. The exception to this rule is emergency consultation, 50 CFR 402.05, when consultation is initiated early in the emergency, but formal consultation is conducted after the emergency is brought under control.

USACE enforcement actions usually arise from activities completed by a non-federal entity that were not authorized by a USACE permit or were not in compliance with an existing USACE permit. NMFS does not consult on the original activity that led to the enforcement action because (1) a non-federal entity conducted the action, (2) no federal authorization was obtained (if this is the case), and (3) the activity is completed (regardless of whether there was federal authorization).

When USACE identifies, investigates, and attempts to correct instances of non-compliance with the permitting requirements, they may take actions (e.g., issue permits containing corrective conditions) that *are* appropriately reviewed under Section 7. There is an opportunity to prospectively analyze future effects and for the consultation process to recommend measures to improve the conservation outcome for listed species and designated critical habitat. The scope of this consultation would be USACE's permitting or other enforcement action and its future effects. The scope of the federal action would not include the unauthorized, non-federal, in-the-past activity that the enforcement action is intended to address. However, the prior activities provide critical context and impacts resulting from the original activity would be included in the environmental baseline of the future action under consultation.

In enforcement cases where USACE believes that the activity under investigation may have had effects, or may have ongoing effects, to listed species or their habitats, NMFS would welcome having informal discussions with USACE on appropriate corrective measures for USACE to consider applying through their enforcement authority. When USACE comes to a preliminary decision on their federal action, ESA Section 7 consultation will be necessary if the federal action (i.e., the future actions being authorized through a permit) may affect listed species.

Examples:

a) USACE discovers an unpermitted dock. Because of environmental and navigational impacts, USACE directs the structure be removed. The scope of the action for potential consultation would be the work needed to remove the dock. (The likely determination would be no effect or not likely to adversely affect (NLAA), depending on the circumstances.)

b) USACE discovers an unpermitted dock. The dock is not in full compliance with the NMFS seagrass key. NMFS recommends, and USACE agrees, that USACE will require as a condition of the permit that the dock be modified so that it fully complies with the seagrass key. In this example, the required corrective action entails replacing the decking, which can be done entirely out of water. The scope of the action for potential consultation would be the out-of-water work to bring the dock into compliance with the seagrass key and the presence of the dock *with* the approved decking (i.e., the dock after corrective action has been taken). (The likely determination would be no effect or NLAA, depending on the circumstances.)

c) USACE discovers an unpermitted private aid-to-navigation (ATON). USACE determines that the continued presence of the ATON has no potential adverse effects on the environment or navigation. USACE makes a no effect determination because the future activity being authorized will not affect listed species or critical habitat. USACE decides to issue an after-the-fact permit authorizing the structure and does not request consultation because of their no effect determination.

d) USACE discovers unpermitted modifications to a large municipal marina. USACE consulted with NMFS and issued a permit for the original construction of the municipal marina. Large areas of (unlisted) seagrass were destroyed by the unauthorized work. NMFS and USACE agree that seagrass mitigation at an appropriate location should be required. The scope of the action for potential consultation would be a) the mitigation work (likely beneficial to listed species and habitat) and b) the continued presence of the marina *modifications*, including any indirect effects such as increased vessel traffic (likely NLAA).